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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES ROBERT JONES,

Defendant and Appellant.

B167398

(Los Angeles County  
Super. Ct. No. BA227820-01)

APPEAL from a judgment of the Superior Court for Los Angeles County, George Lomeli, Judge. Affirmed in part and remanded for resentencing.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, and Victoria B. Wilson, Supervising Deputy Attorney General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Defendant and appellant Charles Robert Jones appeals from a judgment following a jury trial in which the jury found him guilty of possession of a controlled substance, a violation of Health and Safety Code section 11350, subdivision (a), and possession of a smoking device, a violation of Health and Safety Code section 11364. Defendant contends there was insufficient evidence that he possessed a usable amount of the controlled substance (rock cocaine), and that the trial court erred by finding him ineligible for treatment under Proposition 36, the Substance Abuse and Crime Prevention Act of 2000. The Attorney General concedes that defendant was eligible for treatment under Proposition 36. We hold that substantial evidence supports the jury's verdict, but that the trial court erred by failing to sentence defendant under Proposition 36. Therefore, we remand for resentencing; in all other respects the judgment is affirmed.

## **BACKGROUND**

During an encounter between defendant and Los Angeles police officers Richard Kosier (Kosier) and Tim Kalkus, Kosier observed defendant, who was sitting in his van, remove from his lap and place on the floor behind him an object resembling rock cocaine wrapped in cellophane. Kosier ordered defendant to exit the van. As defendant did so, Kosier saw a glass cocaine pipe fall from defendant's lap onto the ground. Kosier placed defendant under arrest and retrieved both objects.

Defendant was charged by information with two counts—possession of a controlled substance and possession of a smoking device. At trial, a criminalist for the Los Angeles Police Department testified that the substance wrapped in cellophane contained cocaine and weighed 0.06 grams. Kosier testified that, based upon his experience as a police officer for 22 years, the cellophane-wrapped object he recovered was a usable amount of rock cocaine, and the glass pipe he recovered was a cocaine pipe.

The jury found defendant guilty of both counts. The trial court referred the case to another division for the purpose of determining whether defendant was eligible for

treatment under Proposition 36. At the hearing in that division (before Judge Marcelita V. Haynes), the court found that defendant was not eligible for Proposition 36 treatment due to his concurrent conviction for possession of a smoking device. The trial court sentenced defendant to the mid-term of two years in state prison for the drug possession count and to a concurrent 90-day term for the possession of a smoking device conviction. The court then suspended the two-year term and placed defendant on probation for 36 months and ordered defendant to attend a nine-month drug program. This appeal followed.

## **DISCUSSION**

### ***A. Sufficiency of the Evidence of a Usable Quantity of Cocaine***

To establish the crime of possession of a controlled substance, the People must prove that defendant had “dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. . . .” (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) Defendant contends there was insufficient evidence to support a finding that the quantity of cocaine found in his possession was a usable quantity of cocaine.

“To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Silva* (2001) 25 Cal.4th 345, 368.) In the present case, Kosier testified that during his 22 years as a police officer he made hundreds of arrests for possession of rock cocaine and possession of cocaine pipes and “observed many individuals smoke rock cocaine using similar pipes.” He also testified that he was instructed regarding the recognition of rock cocaine at a variety of state, local, and federal schools. When asked whether, based upon his background, training, and experience, the

object he recovered from defendant's van was a usable amount of a controlled substance, Kosier said "Yes." Defense counsel did not object to any of this testimony.

Kosier's testimony was sufficient to support the jury's conclusion that defendant possessed a usable quantity of cocaine. The jury reasonably could conclude that Kosier had sufficient experience observing people using rock cocaine to determine whether the rock he recovered from defendant's van was a sufficient size to use for consumption. Because there also was evidence to support a finding that defendant exercised dominion and control of the substance with knowledge of its presence and of its restricted dangerous drug character (i.e., Kosier's testimony that defendant removed the cocaine from his lap and tried to hide it), we hold there was substantial evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt of the charge of possession of a controlled substance.

***B. Eligibility for Treatment Under Proposition 36***

Proposition 36 requires that a person convicted of a nonviolent drug possession offense must receive probation, with the condition that the offender participate in and complete a drug treatment program, unless a statutory exceptions applies. (Pen. Code, § 1210.1, subd. (a).) The statute also prohibits the imposition of incarceration as a condition of probation (*id.*), and it provides that the charge of possession of a controlled substance will be dismissed upon the successful completion of the drug treatment program (Pen. Code, § 1210.1, subd. (d)). One of the statutory exceptions to Proposition 36 treatment applies when the offender is "convicted in the same proceeding of a misdemeanor not related to the use of drugs." (Pen. Code, § 1210.1, subd. (b)(2).) The term "misdemeanor not related to the use of drugs" is defined as "a misdemeanor that does not involve (1) the simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or failure to register as a drug offender, or (2) any activity similar to those listed in paragraph (1)." (Pen. Code, § 1210, subd. (d).)

In the present case, defendant was convicted of both nonviolent drug possession and misdemeanor possession of a smoking device. There is no question that misdemeanor possession of a smoking device—i.e., drug paraphernalia—is a misdemeanor involving the simple possession of drug paraphernalia. Therefore, the court erred by finding that defendant was not eligible for treatment under Proposition 36. Accordingly, we remand this matter to the trial court for resentencing.

### **DISPOSITION**

The matter is remanded for resentencing under Proposition 36. In all other respects, the judgment is affirmed.

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MOSK, J.

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.